



United States Department of Justice

*Environment and Natural Resources Division
Environmental Enforcement Section*

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August 13, 2001

By First Class Mail

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Re: J.H. Baxter Superfund Site

Dear Counsel:

Enclosed for your files is a copy of the signed Consent Decree order from the Northern District of California, dated August 6, 2001. Should you have any questions or require further assistance, please do not hesitate to contact me.

Sincerely,

Victoria Reeder
Senior Paralegal Specialist

enclosure (1)

cc: Sarah Mueller, EPA

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11 Attorneys for the Plaintiff United States of America

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,)

15 Plaintiff,)

16 v.)

17 J.H. BAXTER AND CO.,)
ROSEBURG FOREST PRODUCTS CO.,)
18 INTERNATIONAL PAPER CO., and)
BEAZER EAST, INC.)

19 Defendants.)
20

CIVIL ACTION NO:
C 01-2024 SC

CONSENT DECREE

21 I. BACKGROUND

22 A. The United States of America ("United States"), on behalf of the Administrator of the
23 United States Environmental Protection Agency ("EPA"), has concurrently filed a complaint in this
24 matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and
25 Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), against Beazer East, Inc., J.H.
26 Baxter & Co., International Paper Co., and Roseburg Forest Products Co. (collectively
27 "defendants"), seeking reimbursement of response costs incurred and a declaratory judgment on
28 defendants' liability for response costs to be incurred for response actions taken at or in connection

FILED

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MAY 30 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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1 with the release or threatened release of hazardous substances at the J.H. Baxter Superfund Site in
2 the City of Weed, Siskiyou County, California (the "Site" as defined below).

3 B. The defendants have, pursuant to a Unilateral Administrative Order issued by EPA
4 (and with oversight by EPA, the California EPA and the California Regional Water Quality Control
5 Board for the North Coast Region) implemented remedial measures at the Site.

6 C. The United States and the defendants that have entered into this Consent Decree
7 ("Settling Defendants") agree, and this Court by entering this Consent Decree finds, that this
8 Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will
9 avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair,
10 reasonable, and in the public interest.

11 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED,
12 AND DECREED:

13 II. JURISDICTION

14 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
15 §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over
16 Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent
17 Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

18 III. PARTIES BOUND

19 2. This Consent Decree is binding upon the United States and upon Settling Defendants
20 and their successors and assigns. Any change in ownership or corporate or other legal status,
21 including but not limited to, any transfer of assets or real or personal property, shall in no way alter
22 the status or responsibilities of Settling Defendants under this Consent Decree.

23 IV. DEFINITIONS

24 3. Unless otherwise expressly provided herein, terms used in this Consent Decree that
25 are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning
26 assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this
27 Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Future Response Costs" shall mean all costs incurred by EPA, or DOJ on behalf of EPA, on or after January 1, 2000, at the Site consistent with the scope of the remedy selected in the ROD, including, but not limited to, direct, indirect and oversight costs. Future Response Costs shall also include all Interest on the Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from May 16, 2000 to the date of entry of this Consent Decree.

h. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

i. "Owner Settling Defendants" shall mean J.H. Baxter and Co. and Roseburg Forest Products Co.

j. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

- 1 k. "Parties" shall mean the United States and the Settling Defendants.
- 2 l. "Past Response Costs" shall mean all costs, including but not limited to direct,
3 indirect and oversight costs, that EPA or DOJ on behalf of EPA has paid at or in connection with
4 the Site through December 31, 1999, plus accrued Interest on all such costs through May 15, 2000.
- 5 m. "Record of Decision" or "ROD" shall mean the EPA Record of Decision
6 relating to the Site signed on September 25, 1990 by the Regional Administrator, EPA Region 9, or
7 his/her delegate, and amended on March 27, 1998, and all attachments thereto.
- 8 n. "Plaintiff" shall mean the United States.
- 9 o. "Section" shall mean a portion of this Consent Decree identified by a roman
10 numeral.
- 11 p. "Settling Defendants" shall mean J.H Baxter and Co. ("Baxter"), Roseburg
12 Forest Products Co. ("Roseburg"), International Paper Co., and Beazer East, Inc.
- 13 q. "Site" shall mean the J.H. Baxter Superfund site located in Weed, California.
14 The Site encompasses approximately 33 acres owned by Baxter, portions of property owned by
15 Roseburg, and all property to which hazardous substances and/or pollutants or contaminants from
16 the Site have come to be located. The Site is bordered by residential areas of Weed and by mixed
17 woodlands, and is depicted on the map in Appendix A.
- 18 r. "UAO" shall mean the Unilateral Administrative Order issued by EPA to the
19 Settling Defendants on December 23, 1998.
- 20 s. "United States" shall mean the United States of America, including its
21 departments, agencies and instrumentalities.

22 V. JOINT AND SEVERAL LIABILITY

- 23 4. The obligations of Settling Defendants to pay amounts owed the United States under
24 this Consent Decree are joint and several. In the event of the failure of any one or more Settling
25 Defendants to make the payments required under this Consent Decree, the remaining Settling
26 Defendants shall be responsible for such payments.
- 27
- 28

1 VI. REIMBURSEMENT OF PAST RESPONSE COSTS

2 5. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the
3 J.H. Baxter Special Account within the EPA Hazardous Substance Superfund, \$1,310,300 in full
4 satisfaction of Settling Defendants' obligations with respect to reimbursement of Past Response
5 Costs. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S.
6 Department of Justice account in accordance with current EFT procedures, referencing EPA Region
7 and Site Spill ID Number 09-74, the USAO File Number, and DOJ Case Number 90-11-3-06786.
8 Payment shall be made in accordance with instructions provided to Settling Defendants by the
9 Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of California
10 following lodging of the Consent Decree. Any payments received by the Department of Justice after
11 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendants shall send
12 notice to EPA and DOJ that payment has been made in accordance with Section XVI (Notices and
13 Submissions).

14 VII. REIMBURSEMENT OF FUTURE COSTS

15 6. Settling Defendants shall reimburse the J.H. Baxter Special Account within the EPA
16 Hazardous Substance Superfund for all Future Response Costs not inconsistent with the National
17 Contingency Plan ("NCP"). On a periodic basis, the United States will send Settling Defendants a
18 bill requiring payment that includes a summary of the direct and indirect costs incurred by EPA and
19 its contractors, and the costs incurred by DOJ and its contractors. Settling Defendants shall make
20 all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except
21 as otherwise provided in Paragraph 7. Settling Defendants shall make all payments required by this
22 Paragraph in the form of a certified or cashier's check or checks made payable to "J.H. Baxter
23 Special Account - EPA Hazardous Substance Superfund" and referencing EPA Region 9 and
24 Site/Spill ID #09-74, the DOJ Case Number 90-11-3-06786, and the name and address of the party
25 making payment. Settling Defendants shall send the check(s) to the Regional Superfund Lockbox
26 at:

1 Mellon Bank
2 EPA, Attention: Superfund Accounting
3 P.O. Box 360863M
Pittsburgh, PA 15251

4 and shall send copies of the check(s) to the United States as specified in Section XVI (Notices and
5 Submissions).

6 7. If Settling Defendants believe that any periodic billing summary (referenced in
7 Paragraph 6) contains an accounting error or includes costs that are inconsistent with the NCP, EPA
8 shall, within 60 days of receiving a written request from Settling Defendants, provide Settling
9 Defendants with the background documentation (including all available invoices, work descriptions,
10 and supporting documentation) for the billing summary. Settling Defendants may object to paying
11 any Future Response Costs if they determine that the United States has made an accounting error or
12 if they allege that a cost item that is included represents costs that are inconsistent with the NCP.
13 Such objection shall be made in writing within 30 days of receipt of the bill, or within 30 days of
14 receipt of the background documentation, whichever is later, and must be sent to the United States
15 pursuant to Section XVI (Notices and Submissions). Any such objection shall specifically identify
16 the Future Response Costs to which Settling Defendants object, and the basis for such objection.
17 In the event of an objection, Settling Defendants shall, within 30 days of receipt of the bill, or within
18 30 days of receipt of the background documentation, whichever is later, pay all Future Response
19 Costs to which they have not objected, to the United States in the manner described in Paragraph 6.
20 Simultaneously, Settling Defendants shall establish an interest-bearing escrow account, which pays
21 a commercially reasonable rate of interest, in a federally-insured bank duly chartered in the State of
22 California and remit to that escrow account funds equivalent to the amount of the Future Response
23 Costs to which Settling Defendants have objected. Settling Defendants shall send to the United
24 States, as provided in Section XVI (Notices and Submissions), a copy of the transmittal letter and
25 check paying the Future Response Costs to which Settling Defendants have not objected, and a copy
26 of the correspondence that establishes and funds the escrow account, including, but not limited to,
27 information containing the identity of the bank and bank account under which the escrow account
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1 is established as well as a bank statement showing the initial balance of the escrow account.
2 Simultaneously with the establishment of the escrow account, Settling Defendants shall immediately
3 initiate the Dispute Resolution procedures in Section IX (Dispute Resolution). If the United States
4 prevails in the dispute, within 5 days of the resolution of the dispute, Settling Defendants shall pay
5 the sums due (with accrued interest) to the United States in the manner described in Paragraph 6.
6 If Settling Defendants prevail concerning any aspect of the objected costs, Settling Defendants shall
7 pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the
8 United States in the manner described Paragraph 6. The balance of the escrow account shall be
9 disbursed to Settling Defendants. The procedures set forth in this Paragraph, in conjunction with
10 the procedures set forth in Section IX (Dispute Resolution), shall be the exclusive mechanisms for
11 resolving disputes regarding Settling Defendants' obligation to reimburse the United States for its
12 Future Response Costs.

13 VIII. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

14 8. Interest on Late Payments. In the event that any payments required by Section VI
15 (Reimbursement of Past Response Costs) are not made within 30 days of the entry of this Consent
16 Decree, or payments required by Section VII (Reimbursement of Future Costs) and Paragraph 9
17 (Stipulated Penalties), are not received when due, Settling Defendants shall pay Interest on the
18 unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to
19 accrue 30 days after the effective date of this Consent Decree. The Interest to be paid on Future
20 Response Costs shall begin to accrue on the date of the bill. The Interest to be paid on Stipulated
21 Penalties shall begin to accrue 30 days after the date of the demand for payment of the penalties by
22 EPA. Interest shall accrue through the date the United States receives Settling Defendants' payment.
23 If Settling Defendants object to the payment of any Future Response Costs pursuant to Paragraph
24 7, and Settling Defendants prevail on the disputed issue pursuant to the Dispute Resolution
25 provisions set forth in Section IX, Settling Defendants shall not owe Interest on Future Response
26 Costs that Settling Defendants successfully challenged. Payments of Interest made under this
27 Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of
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Settling Defendants' failure to make timely payments under this Section. Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 9.

9. Stipulated Penalties.

a. If any amounts due to EPA under this Consent Decree are not paid by the required date, Settling Defendants shall pay to EPA as a stipulated penalty, in addition to the Interest required by Paragraph 8, \$500 per violation per day that such payment is late.

b. If Settling Defendants do not comply with Section XIII (Site Access & Institutional Controls), or Section XIV (Access to Information), Settling Defendants shall pay to EPA, as a stipulated penalty, \$500 per violation per day of such noncompliance.

c. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be made by certified or cashier's check made payable to "J.H. Baxter Special Account - EPA Hazardous Substance Superfund" and shall be sent to:

Mellon Bank
U.S. EPA Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

All payments shall indicate that the payment is for stipulated penalties and shall reference the name and address of the party making payment, EPA Region 9 and Site Spill ID Number 09-74, the USAO File Number, and DOJ Case Number 90-11-3-06786. Copies of check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter[s], shall be sent to EPA and DOJ as provided in Section XVI (Notices and Submissions).

d. Penalties shall accrue as provided by Paragraph 9, regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment, but need only be paid by Settling Defendants upon Plaintiff's demand. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

1 e. Penalties shall continue to accrue as provided in Paragraph 9, during any
2 dispute resolution period, but need not be paid until the following:

3 (1) If the dispute is resolved by agreement or by a decision of EPA that
4 is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within
5 15 days of the agreement or Settling Respondents' receipt of EPA's decision or order;

6 (2) If the dispute is appealed to this Court and the United States prevails
7 in whole or in part, within 60 days of receipt of the Court's decision or order (except as provided in
8 Subparagraph (3) below), Settling Defendants shall pay all accrued penalties owed to EPA as
9 determined by the Court;

10 (3) If this Court's decision is appealed by any Party, Settling Defendants
11 shall pay all accrued penalties determined by the District Court to be owing to the United States into
12 an interest-bearing escrow account, which pays a commercially reasonable rate of interest, within
13 60 days of receipt of this Court's decision or order. Penalties shall be paid into this account as they
14 continue to accrue, at least every 60 days. If the United States prevails in the dispute, within 5 days
15 of the resolution of the dispute, Settling Defendants shall pay the sums due (with accrued interest)
16 to the United States in the manner described in Paragraph 6. If Settling Defendants prevail
17 concerning any aspect of the objected costs, Settling Defendants shall pay that portion of the costs
18 (plus associated accrued interest) for which they did not prevail to the United States in the manner
19 described Paragraph 6. The balance of the escrow account shall be disbursed to Settling Defendants.

20 f. If Settling Defendants fail to pay stipulated penalties when due, the United
21 States may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall
22 pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant
23 to this Paragraph.

24 g. Nothing in this Consent Decree shall be construed as prohibiting, altering, or
25 in any way limiting the ability of the United States to seek any other remedies or sanctions available
26 by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon
27 which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA.

1 Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l)
2 of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case
3 of a willful violation of the Consent Decree.

4 h. Notwithstanding any other provision of this Section, the United States may,
5 in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant
6 to this Consent Decree.

7 10. If the United States brings an action to enforce this Consent Decree, Settling
8 Defendants shall reimburse the United States for all costs of such action, including but not limited
9 to costs of attorney time.

10 11. Payments made under Paragraphs 8, 9 and 10 shall be in addition to any other
11 remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with
12 the requirements of this Consent Decree.

13 IX. DISPUTE RESOLUTION

14 12. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution
15 procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with
16 respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to
17 actions by the United States to enforce obligations of the Settling Defendants that have not been
18 disputed in accordance with this Section.

19 13. Any dispute which arises under or with respect to this Consent Decree shall in the
20 first instance be the subject of informal negotiations between the parties to the dispute. The period
21 for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is
22 extended by written agreement of the parties to the dispute. The dispute shall be considered to have
23 arisen when one party sends the other parties a written Notice of Dispute.

24 14. If the informal negotiations are unsuccessful, the determination of EPA shall control,
25 unless Settling Defendants file a motion with this court for dispute resolution. Any such motion
26 must be filed and concurrently served on DOJ and EPA within thirty (30) calendar days after receipt
27 by Settling Defendants of an EPA notice in writing terminating informal negotiations. The United
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1 States shall then have thirty (30) calendar days to respond to Settling Defendants' motion. In
2 disputes regarding EPA's request for stipulated penalties under Paragraph 9, Settling Defendants
3 bear the burden of proving, by a preponderance of the evidence, that Settling Defendants did not
4 violate the terms and conditions of this Consent Decree. In any other dispute, Settling Defendants
5 shall bear the burden of proving the EPA's position is arbitrary and capricious.

6 15. The invocation of formal dispute resolution procedures under this Section shall not
7 extend, postpone or affect in any way any obligation of Settling Defendants under this Consent
8 Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties and
9 Interest with respect to the disputed matter shall continue to accrue but payment shall be stayed
10 pending resolution of the dispute as provided in Paragraphs 8 and 9.e. Notwithstanding the stay of
11 payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable
12 provision of this Consent Decree. In the event that Settling Defendants do not prevail on the
13 disputed issue, Stipulated Penalties and Interest shall be assessed and paid as provided in Paragraphs
14 8 and 9.

15 X. COVENANT NOT TO SUE BY PLAINTIFF

16 16. Covenant Not to Sue by United States. Except as specifically provided in Paragraph
17 17 (Reservation of Rights by United States), the United States covenants not to sue Settling
18 Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response
19 Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by
20 Section VI (Reimbursement of Past Response Costs to the United States) and Paragraph 8 (Interest
21 on Late Payments) and Paragraph 9 (Stipulated Penalties). This covenant not to sue is conditioned
22 upon the satisfactory performance by Settling Defendants of their obligations under this Consent
23 Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any
24 other person.

1 17. Reservation of Rights by United States. The covenant not to sue set forth in
2 Paragraph 16 does not pertain to any matters other than those expressly specified therein. The
3 United States reserves, and this Consent Decree is without prejudice to, all rights against Settling
4 Defendants with respect to all other matters, including but not limited to:

5 a. liability for failure of Settling Defendants to meet a requirement of this
6 Consent Decree;

7 b. liability for damages for injury to, destruction of, or loss of natural resources,
8 and for the costs of any natural resource damage assessments;

9 c. criminal liability;

10 d. liability for injunctive relief or administrative order enforcement under
11 Section 106 of CERCLA, 42 U.S.C. § 9606; and

12 e. liability for costs incurred or to be incurred by the United States that are not
13 within the definition of Past Response Costs.

14 XI. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

15 18. Settling Defendants covenant not to sue and agree not to assert any claims or causes
16 of action against the United States, or its contractors or employees, with respect to Past and Future
17 Response Costs or this Consent Decree, including but not limited to:

18 a. any direct or indirect claim for reimbursement from the Hazardous Substance
19 Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2),
20 9607, 9611, 9612, or 9613, or any other provision of law;

21 b. any claim arising out of response actions at the Site for which the Past
22 Response Costs were incurred or Future Response Costs will be incurred; and

23 c. any claim against the United States pursuant to Sections 107 and 113 of
24 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past and Future Response Costs.

25 19. Nothing in this Consent Decree shall be deemed to constitute approval or
26 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
27 40 C.F.R. 300.700(d).

1 XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

2 20. Nothing in this Consent Decree shall be construed to create any rights in, or grant any
3 cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly
4 reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims,
5 demands, and causes of action which each Party may have with respect to any matter, transaction,
6 or occurrence relating in any way to the Site against any person not a Party hereto.

7 21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling
8 Defendants are entitled, as of the effective date of this Consent Decree, to protection from
9 contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2),
10 for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are
11 Past and Future Response Costs.

12 22. Each Settling Defendant agrees that, with respect to any suit or claim for contribution
13 brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no
14 later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees
15 that, with respect to any suit or claim for contribution brought against it for matters related to this
16 Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint
17 or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ within 10 days of
18 service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order
19 from a court setting a case for trial, for matters related to this Consent Decree.

20 23. In any subsequent administrative or judicial proceeding initiated by the United States
21 for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling
22 Defendants shall not assert, and may not maintain, any defense or claim based upon the principles
23 of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based
24 upon any contention that the claims raised by the United States in the subsequent proceeding were
25 or should have been brought in the instant case; provided, however, that nothing in this Paragraph
26 affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section X.

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- (3) Preventing exposure to waste left in the DNAPL zone; and
- (4) Prohibiting activities that would disturb the integrity of the remedy, including appropriate prohibitions on activities that would disturb the soil and/or any cap placed upon such soil, seeps, slurry wall and RCRA equivalent disposal cell, unless approved in writing and in advance by EPA.

d. Owner Settling Defendants shall execute and record in the Recorder's Office of Siskiyou County, State of California, an environmental restriction applicable to the Site, running with the land, that:

(1) Grants a right of access to the Site and any other property under the control of Owner Settling Defendants to which access is necessary for the purpose of conducting any response activity related to this Consent Decree, including but not limited to those activities listed in Paragraph 24 of this Consent Decree.

(a) Owner Settling Defendants shall grant the access rights to one or more of the following persons, as determined by EPA: (i) the United States, on behalf of EPA, and its representatives; and/or (ii) the State and its representatives.

(b) Those individuals granted access rights pursuant to Paragraph 27.d.(1)(a) shall, when on the Site or any portion thereof, abide by all reasonable safety standards requested by the property owner of that portion of the Site.

(2) Grants the right to EPA and/or the State to enforce against all subsequent owners of the Site or any portion of the Site the land/water use restrictions listed in Paragraph 27.c. of this Consent Decree, or other restrictions that EPA reasonably determines are necessary to ensure non-interference with or ensure the protectiveness of the remedial measures performed pursuant to the ROD, to the extent authorized by applicable laws and regulations.

(3) Binds subsequent owners of the Site.

1 e. Owner Settling Defendants shall, within 45 days of entry of this Consent
2 Decree, submit to EPA for review and approval with respect to the Site or such other property:

3 (1) A draft environmental restriction, in substantially the form attached
4 hereto as Appendix B, that complies with all applicable laws of the State of California, including but
5 not limited to Civil Code section 1471 and Health and Safety Code section 25355.5. The land use
6 restrictions in the environmental restriction shall be limited to the land use restrictions listed in
7 Paragraph 27.c. of the Consent Decree, Section 67 of the UAO, and Section 4.1.7.5 of the Statement
8 of Work incorporated in the UAO.

9 (2) A current title commitment or report prepared in accordance with the
10 U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisition by
11 the United States (1970) (the "Standards").

12 Within 15 days of EPA's approval and acceptance of the environmental restriction, Owner Settling
13 Defendants shall update the title search and, if it is determined that nothing has occurred since the
14 effective date of the commitment or report to affect the title adversely, record the environmental
15 restriction with the Recorder's Office, Siskiyou County. Within 30 days of recording the
16 environmental restriction, Owner Settling Defendants shall provide EPA with final title evidence
17 acceptable under the Standards, and a certified copy of the original recorded environmental
18 restriction showing the clerk's recording stamps.

19 f. If EPA reasonably determines that circumstances have changed such that
20 additional land/water use restrictions in the form of state or local laws, regulations, ordinances or
21 other governmental controls are needed to implement the remedy selected in the ROD, ensure the
22 integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall
23 make reasonable efforts to cooperate with EPA's efforts to secure such governmental controls.

24 g. Nothing in this Section (Section XIII Site Access & Institutional Controls)
25 shall subject Settling Defendants to Stipulated Penalties for the failure of a future property owner
26 or operator at the Site to comply with the environmental restriction or title commitment referenced
27 in Paragraph 27e(1) and (2). Owner Settling Defendants' potential liability for Stipulated Penalties
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1 under this Section shall be based solely on their obligations to provide access (as set forth in
2 Paragraphs 24 through 25) and to comply with the terms and deadlines set forth in this Paragraph
3 (Paragraph 27 (Institutional Controls)).

4 XIV. ACCESS TO INFORMATION

5 28. Settling Defendants shall provide to EPA, upon request, copies of all documents and
6 information within their possession or control or that of their contractors or agents relating to
7 activities at the Site, including, but not limited to, sampling, analysis, chain of custody records,
8 manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other
9 documents or information related to the Site.

10 29. Confidential Business Information and Privileged Documents.

11 a. Settling Defendants may assert business confidentiality claims covering part
12 or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent
13 permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40
14 C.F.R. 2.203(b). Documents or information determined to be confidential by EPA will be accorded
15 the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies
16 documents or information when they are submitted to EPA, or if EPA has notified Settling
17 Defendants that the documents or information are not confidential under the standards of Section
18 104(e)(7) of CERCLA, the public may be given access to such documents or information without
19 further notice to Settling Defendants.

20 b. Settling Defendants may assert that certain documents, records or other
21 information are privileged under the attorney-client privilege or any other privilege recognized by
22 federal law. If Settling Defendants assert such a privilege in lieu of providing documents, they shall
23 provide Plaintiff with the following: 1) the title of the document, record, or information; 2) the date
24 of the document, record, or information; 3) the name and title of the author of the document, record,
25 or information; 4) the name and title of each addressee and recipient; 5) a description of the subject
26 of the document, record, or information; and 6) the privilege asserted. However, no documents,
27 reports or other information created or generated pursuant to the requirements of this or any other
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1 consent decree with the United States shall be withheld on the grounds that they are privileged. If
2 a claim of privilege applies only to a portion of a document, the document shall be provided to
3 Plaintiff in redacted form to mask the privileged information only. Settling Defendants shall retain
4 all records and documents that they claim to be privileged until the United States has had a
5 reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in
6 Settling Defendants' favor.

7 30. No claim of confidentiality shall be made with respect to any data, including but not
8 limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering
9 data, or any other documents or information evidencing conditions at or around the Site.

10 XV. RETENTION OF RECORDS

11 31. Until 10 years after the entry of this Consent Decree, Settling Defendants shall
12 preserve and retain one set of all records and documents now in their possession or control, or which
13 come into its possession or control, that relate in any manner to response actions taken at the Site
14 or the liability of any person for response actions conducted and to be conducted at the Site,
15 regardless of any corporate retention policy to the contrary. Until 10 years after the entry of this
16 Consent Decree, Settling Defendants shall also instruct their contractors and agents to preserve all
17 documents, records, and information of whatever kind, nature or description relating to the
18 performance of the Work.

19 32. After the conclusion of the document retention period in Paragraph 31, Settling
20 Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such records
21 or documents described in Paragraph 31, and, upon request by EPA or DOJ, Settling Defendants
22 shall deliver any such records or documents to EPA or DOJ. Settling Defendants may assert that
23 certain documents, records, or other information are privileged under the attorney-client privilege
24 or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they
25 shall provide Plaintiff with the following: 1) the title of the document, record, or information; 2) the
26 date of the document, record, or information; 3) the name and title of the author of the document,
27 record, or information; 4) the name and title of each addressee and recipient; 5) a description of the
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1 subject of the document, record, or information; and 6) the privilege asserted. However, no
2 documents, reports, or other information created or generated pursuant to the requirements of this
3 or any other consent decree with the United States shall be withheld on the grounds that they are
4 privileged. If a claim of privilege applies only to a portion of a document, the document shall be
5 provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendants
6 shall retain all records and documents that they claim to be privileged until the United States has had
7 a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in
8 Settling Defendants' favor.

9 33. By signing this Consent Decree, each Settling Defendant certifies individually that,
10 to the best of its knowledge and belief, it has:

11 a. fully complied with any and all EPA requests for information regarding the
12 Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) by
13 having conducted a thorough, comprehensive, good faith search for documents, and having fully and
14 accurately disclosed to EPA, all information currently in its possession, or in the possession of its
15 officers, directors, employees, contractors or agents, which relates in any way to the ownership,
16 operation or control of the Site, or to the ownership, possession, generation, treatment,
17 transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in
18 connection with the Site; and

19 b. not altered, mutilated, discarded, destroyed or otherwise disposed of any
20 records, documents or other information relating to its potential liability regarding the Site, after
21 notification of potential liability or the filing of a suit against Settling Defendant regarding the Site.

22 XVI. NOTICES AND SUBMISSIONS

23 34. Whenever, under the terms of this Consent Decree, notice is required to be given or
24 a document is required to be sent by one party to another, it shall be directed to the individuals at the
25 addresses specified below, unless those individuals or their successors give notice of a change to the
26 other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of
27 any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ,
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1 and Settling Defendants, respectively.

2 As to the United States:

3 As to DOJ:

4 Chief, Environmental Enforcement Section
5 Environment and Natural Resources Division
6 U.S. Department of Justice
7 Post Office Box 7611
8 Washington, D.C. 20044-7611
9 Reference Case No. 90-11-3-06786

10 As to EPA:

11 Sarah Mueller
12 Assistant Regional Counsel
13 U.S. EPA, Region 9
14 75 Hawthorne Street
15 San Francisco, CA 94105
16 Re: J.H. Baxter Superfund Site

17 and

18 David Wood, Chief, Cost Accounting,
19 U.S. EPA, Region 9
20 75 Hawthorne Street
21 San Francisco, CA 94105
22 Re: J.H. Baxter Superfund Site

23 As to Settling Defendants:

24 As to Beazer East, Inc.:

25 Michael Tischuk
26 Beazer East, Inc.
27 One Oxford Centre, 30th Floor
28 Pittsburgh, PA 15219

and

29 Ronald C. Hausmann, Esq.
30 Munger, Tolles & Olson
31 Suite 1900
32 33 New Montgomery
33 San Francisco, CA 94105

1 As to International Paper:

2 Howard D. Lienert, P.E.
3 International Paper Company
4 International Place One
5 6400 Poplar Avenue
6 Memphis, TN 38197

7 and

8 International Paper
9 c/o CT Corporation System
10 818 West Seventh Street
11 Los Angeles, CA 90017

12 As to J.H. Baxter and Company:

13 Georgia Baxter
14 Executive Vice President
15 J.H. Baxter and Company
16 1700 South El Camino Real
17 P.O. Box 5902
18 San Mateo, CA 94402-0902

19 and

20 Seth Goldberg
21 Steptoe & Johnson
22 1330 Connecticut Ave., N.W.
23 Washington, DC 20036

24 As to Roseburg Forest Products Company:

25 Max Kimmel
26 Manager, Environmental Affairs
27 Roseburg Forest Products Co.
28 P.O. Box 1088
29 Roseburg, OR 97470

30 XVII. RETENTION OF JURISDICTION

31 35. This Court shall retain jurisdiction over this matter for the purpose of interpreting and
32 enforcing the terms of this Consent Decree.

1 XVIII. INTEGRATION

2 36. This Consent Decree constitutes the final, complete and exclusive agreement and
3 understanding among the Parties with respect to the settlement embodied in this Consent Decree.
4 The Parties acknowledge that there are no representations, agreements or understandings relating to
5 the settlement other than those expressly contained in this Consent Decree. The following
6 appendices are attached to and incorporated into this Consent Decree: Appendix A is a map of the
7 Site; Appendix B is a model deed restriction referred to in Paragraph 27.

8 XIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

9 37. This Consent Decree shall be lodged with the Court for a period of not less than 30
10 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves
11 the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose
12 facts or considerations which indicate that this Consent Decree is inappropriate, improper, or
13 inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

14 38. If for any reason this Court should decline to approve this Consent Decree in the form
15 presented, this agreement is voidable at the sole discretion of any party and the terms of the
16 agreement may not be used as evidence in any litigation between the Parties.

17 XX. EFFECTIVE DATE

18 39. The effective date of this Consent Decree shall be the date upon which it is entered
19 by the Court.

20 XXI. SIGNATORIES/SERVICE

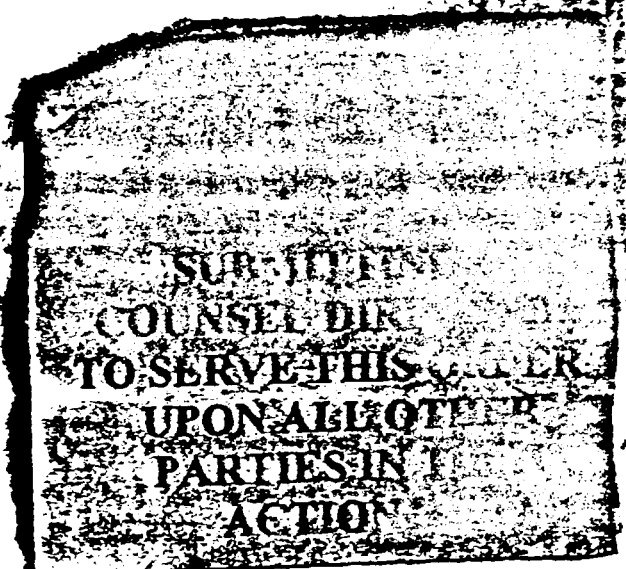
21 40. Each undersigned representative of a Settling Defendant to this Consent Decree and
22 the Principal Deputy Section Chief for the Environmental Enforcement Section, Environment and
23 Natural Resources Division of the United States Department of Justice certifies that he or she is
24 authorized to enter into the terms and conditions of this Consent Decree and to execute and bind
25 legally such Party to this document.

1 41. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree
2 by this Court or to challenge any provision of this Consent Decree, unless the United States has
3 notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

4 42. Each Settling Defendant shall identify, on the attached signature page, the name and
5 address of an agent who is authorized to accept service of process by mail on behalf of that Party
6 with respect to all matters arising under or relating to this Consent Decree. Settling Defendants
7 hereby agree to accept service in that manner and to waive the formal service requirements set forth
8 in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court,
9 including but not limited to, service of a summons.

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14 ORDERED, Dated and ENTERED this 6 day of August, 2001.

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UNITED STATES DISTRICT JUDGE
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1 WE HEREBY CONSENT to the entry of this Decree.
2 FOR PLAINTIFF UNITED STATES OF AMERICA:
3

4 4-18-01
5 DATE

Walker Smith
WALKER SMITH
Principal Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
Washington, D.C.

10 4/18/01
11 DATE

Noel Wise
NOEL WISE
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
301 Howard Street, Suite 870
San Francisco, CA 94105
Telephone: (415) 744-6471

1 FOR PLAINTIFF UNITED STATES OF AMERICA:
2
3

4 5-21-01
DATE

Keith Takata
KEITH TAKATA
Director, Superfund Division
U.S. Environmental Protection Agency,
Region IX
San Francisco, CA

10
11 May 9, 2001
DATE

Sarah E. Mueller
SARAH MUELLER
Assistant Regional Counsel
U.S. Environmental Protection Agency,
Region IX
San Francisco, CA

FOR DEFENDANT BEAZER EAST, INC.

5-16-01

DATE

JILL M. BLUNDON

Vice President

Beazer East, Inc.

1 WE HEREBY CONSENT to the entry of this Decree.

2 FOR DEFENDANT J.H. BAXTER AND CO.

3
4 4/30/01
DATE

Migra Baxter

1 FOR DEFENDANT INTERNATIONAL PAPER

2

3 4-30-01

DATE

4

Howard D. Lienert

5

Manager

6

Environmental Regulatory Affairs

7

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1 FOR DEFENDANT ROSEBURG FOREST PRODUCTS CO.

2

3

4/26/01
DATE

4

Allyn C. Ford
ALLYN C. FORD
President, Roseburg Forest Products Co.

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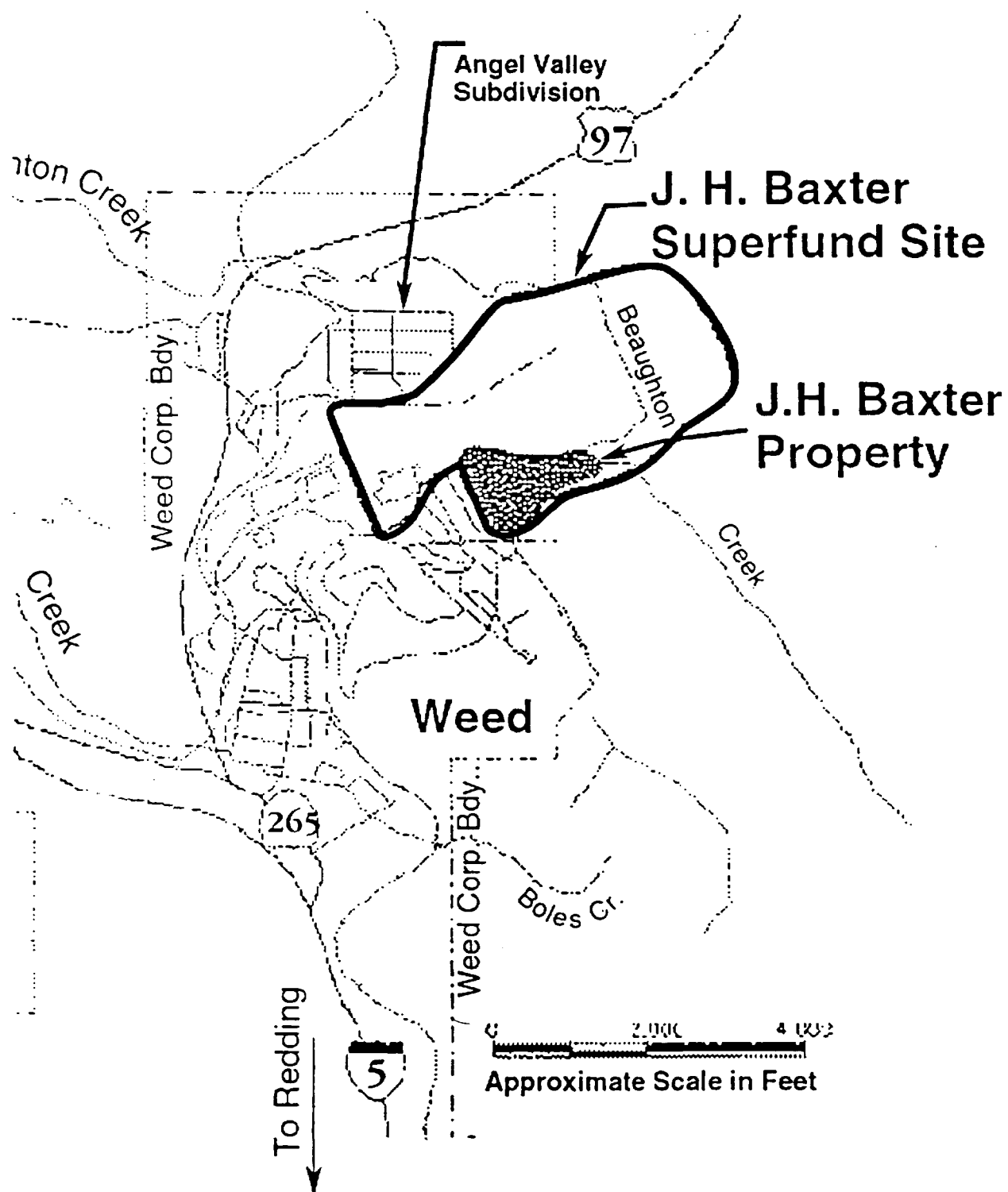
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APPENDIX A

J.H. Baxter Superfund Site, Weed, California

The Site is located in the northeastern portion of the city of Weed in Siskiyou County, California, and includes properties owned by J. H. Baxter and Roseburg Forest Products. It is bordered on the northwest by residential areas of Weed, to the north by the Angel Valley Subdivision and Lincoln Park, to the east by mixed woodlands, and to the south by irrigated pasture. Beaughton Creek runs through the eastern portion of the Site.



**Site Location Map
J.H. Baxter Superfund Site
Weed, California**

APPENDIX E

RECORDING REQUESTED BY:

/Covenantor's name/

/street address/

/City/, California /zip code/

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control

Region ____

/street address/

/City/, California /zip code/

Attention: */name of Branch Chief/, Chief*

/ branch designation/

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

COVENANT TO RESTRICT USE OF PROPERTY

ENVIRONMENTAL RESTRICTION

(Re: */Insert parcel number(s) and name of site property to be restricted./*)

This Covenant and Agreement ("Covenant") is made by and between */name of Covenantor/* [Note: *"Covenantor" must include all parties who are owners of record of the real property. Verify ownership in the records at the County Recorder's Office.*]¹ (the "Covenantor"), the current owner of property situated in */city/*, County of [], State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471(c), the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code ("H&SC") section 25260. The Covenantor and the Department,

¹In this model deed restriction language in parentheses should be included in the deed restriction. Language in brackets is given either as guidance *[bold italics]* or as optional language that may have to be adapted to comport with the particular facts of the property to be restricted.

APPENDIX B

collectively referred to as the "Parties", hereby agree pursuant to Civil Code section 1471(c) and H&SC section 25355.5 that the use of the Property be restricted as set forth in this Covenant. The Parties further intend that the provisions of this Covenant also be for the benefit of, and be enforceable by, the U.S. Environmental Protection Agency ("U.S. EPA") as a third party beneficiary.

ARTICLE I STATEMENT OF FACTS

1.01. The Property, totaling approximately [acres] [square yards] is more particularly described and depicted in Exhibit "A", attached hereto and incorporated herein by this reference. *[Exhibit "A" must include the legal description of the property used by the county recorder. If the property does not already have a legal description (it generally will not if it is a portion of a larger piece of property) a survey will be required.]* The Property is located in the area now generally bounded by *[include narrative description of the area; this will typically be street names: e.g., Main Street on the north, Maple Street on the east, etc.]* County of [], State of California. This property is more specifically described as [] County Assessor's Parcel No.(s): [] *[list exact Assessor's Parcel number(s)]*

1.02. *[Use this paragraph if imposing additional restrictions on a portion of the Property, for example on a capped portion, or if for any other reason it is necessary to precisely identify any portion of the property, such as an area with groundwater monitoring wells. The purpose of this paragraph is to give the precise location of such areas. Renumber following paragraphs accordingly.]* A limited portion of the Property is more particularly described in Exhibit "B" which is attached and incorporated by this reference ("Capped Property") as defined below *[or "(other identified) Property"]*. *[Exhibit B must include a legal description of the exact area(s) being restricted and any necessary diagram(s). This will generally require a legal survey and engineering drawing for the Cap or other area to be further restricted.]* The [Capped (or other description)] Property is located in the area now generally bounded by []. *[Include language that generally describes the Capped or other identified Property.]* The [Capped (or other identified)

APPENDIX B

Property is also more specifically described as encompassing [] County Assessor's Parcel No.(s) [].

1.03. *[Briefly describe the remedial measures implemented at the Property, including, if applicable, installation of a cap and construction and ongoing operation and maintenance of a groundwater treatment system, in order to identify the remaining contaminants and physical remedial measures on the Property that necessitate this deed restriction. This paragraph should refer to, and give the approval date for, the RAP, ROD, RAW or other decision document that selected the remedial measures at the Property and required this Covenant.]*

SAMPLE [For a property with remaining contamination, but no cap, O&M, or other ongoing response activities]: The Property is [a portion of a site] being remediated pursuant to a Remedial Action Plan pursuant to Chapter 6.8 of Division 20 of the H&SC, under the oversight of the Department. The Remedial Action Plan provides that a deed restriction be required as part of the site remediation, because lead, which is a hazardous substance, as defined in H&SC section 25316, and a hazardous material as defined in H&SC section 25260 remains at depths of 10 feet or more below the surface of the Property. The Department circulated the Remedial Action Plan, which contains a Final Health Risk Assessment, together with a draft [negative declaration] [environmental impact report] pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. for public review and comment. The Remedial Action Plan and the [negative declaration] [environmental impact report], were approved by the Department on [date], pursuant to which the Property was excavated to a depth of 10 feet, graded, then backfilled with clean soil.

SAMPLE [For a property with ongoing operation and maintenance of a monitoring or treatment system and/or cap. The exact provisions of this paragraph will vary depending upon the facts of the particular site or facility. The paragraph below is illustrative of the kind of information that should be included. Note specifically there is reference to a signed Operation and Maintenance Agreement.]: [Covenantor] [or party responsible for

APPENDIX B

the activity, if different from Covenantor] is remediating the Property under the supervision and authority of the Department. The Property is [a portion of a site] being remediated pursuant to a Remedial Action Plan pursuant to Chapter 6.8 of Division 20 of the H&SC. Because hazardous substances, as defined in H&SC section 25316, which are also hazardous materials as defined in H&SC section 25260, including volatile organic compounds, total petroleum hydrocarbons, chlorinated benzenes and polychlorinated biphenyls, remain in the soil and groundwater in and under portions of the Property, the Remedial Action Plan provides that a deed restriction be required as part of the site remediation. The Department circulated the Remedial Action Plan, which contains a Final Health Risk Assessment, together with a draft [negative declaration] [environmental impact report] pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. for public review and comment. The Remedial Action Plan and the [negative declaration] [environmental impact report], were approved by the Department on [date]. Remediation includes installing and maintaining a synthetic membrane cover ("Cap") over the Capped Property. The Cap consists of a low permeability synthetic membrane and other associated layers, as more particularly described in the engineering drawing attached as Exhibit "B" hereto. The response action also includes the installation and operation of: (1) a passive gas collection system on the Capped Property which removes volatile organic compounds migrating upward from under the Cap, (2) a vapor extraction system, which remediates certain volatile organic compound-impacted soils, and (3) groundwater monitoring wells ("Monitoring Wells"). The location of the gas collection system, vapor extraction system, and Monitoring Wells are shown on Exhibit "B". *[This exhibit will have been identified in paragraph 1.02.]* The operation and maintenance of the Cap, gas collection system, vapor extraction system, and Monitoring Wells is pursuant to an Operation and Maintenance Manual incorporated into the Operation and Maintenance Agreement between [Covenantor] *[or name of other entity]* and the Department dated []. *[If an O&M Agreement has not been signed, the approval date for the O&M Manual or Plan should be referenced.]*

1.04. *[This paragraph should set out specific information about the risk assessment findings relevant to the contaminants of concern remaining at the property, essentially the basis*

APPENDIX B

for the restrictions imposed by this covenant. The Restrictions in Paragraphs 4.01, and any requirement for Soil Management Activity and any Prohibited Activity must be linked to the contaminants and risk assessment as discussed in this paragraph. The following paragraph is given for purposes of illustration. Each site will have different facts; those should be developed in a manner similar to the sample paragraph given here. Land use must be consistent with the approved RAW, RAP or ROD and the health risk assessment.]

SAMPLE: As detailed in the Final Health Risk Assessment *[or other appropriate document]* as approved by the Department on *[date]*, all or a portion of the surface and subsurface soils within 10 feet of the surface of the Property contain hazardous substances, as defined in H&SC section 25316, which include the following metal contaminants of concern in the ranges set forth below: arsenic (0.3 to 38.1 parts per million ("ppm")), beryllium (2.6 ppm), copper (4.6 to 756 ppm, and nickel (7.3-105 ppm). In addition, there are low pH soils. Based on the Final Risk Assessment the Department concluded that use of the Property as a residence, hospital, school for persons under the age of 21 or day care center would entail an unacceptable cancer risk. The Department further concluded that the Property, as remediated, and subject to the restrictions of this Covenant, does not present an unacceptable threat to human safety or the environment, if limited to *[as applicable: commercial and industrial, parks, open space,[or other appropriate]]* use.

SAMPLE: [Note: Groundwater restrictions in Paragraph 3.04 must be based on a discussion of what contaminants are found in groundwater at the site, and what the drinking water standards are.]

Groundwater at the Property is found 15 to 20 feet below ground surface. Contaminants in the groundwater include benzene (50- 123 ppm), chromium (75- 213 ppm) and TCE (350- 780 ppm). California drinking water standards are benzene at 0.08 ppm, chromium at 30 ppm and TCE at 5 ppm. The Department concludes that the groundwater presents an unacceptable threat to human health and safety.

APPENDIX B

ARTICLE II DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. U.S. EPA. "U.S. EPA" means the United States Environmental Protection Agency and includes its successor agencies, if any.

2.03. Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, who at any time hold title to or an ownership interest in, all or any portion of the Property.

2.04. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.05. CERCLA Lead Agency. "CERCLA Lead Agency" means the governmental entity having the designated lead responsibility to implement response action under the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. _____ is the CERCLA Lead Agency at the time of the recording of this instrument.

ARTICLE III GENERAL PROVISIONS

3.01. Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to H&SC section 25355.5(a)(1)(C) and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property, (c) is for the benefit of, and is enforceable

APPENDIX E

by U.S. EPA as a third party beneficiary and by the Department, and (d) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to H&SC section 25355.5(a)(1)(C), this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471(b), all successive owners of the Property are expressly bound hereby for the benefit of the Department and U.S. EPA.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease, sublease, assignment or other transfer of the Property, or any portion thereof, the owner, lessor, sublessor, assignor or other transferor shall give the buyer, lessee, sublessee, assignee or other transferee written notice that hazardous substances are located on or beneath the Property.

3.04. Incorporation into Deeds and Leases. The Restrictions set forth herein shall be incorporated by reference in each and all deeds, leases, assignments, or other transfers of all or any portion of the Property which are hereafter executed or renewed. Further, each Owner or Occupant shall include in any instrument conveying any interest in all or any portion of the Property, including but not limited to deeds, leases, and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTION AND COVENANT TO RESTRICT USE OF PROPERTY, RECORDED IN THE PUBLIC LAND RECORDS ON __ [DATE] __, IN BOOK __, PAGE __, IN FAVOR OF AND ENFORCEABLE BY THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

3.05. Conveyance of Property. The Owner shall provide notice to the Department and to U.S. EPA not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessory encumbrances). The Department and U.S. EPA shall not, by reason of this Covenant, have authority to approve, disapprove, or

APPENDIX E

otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE IV RESTRICTIONS

[The following examples are intended to be illustrative. Not all of them will be applicable. The restrictions for a particular property should have a direct relationship to what the Health Risk Assessment said was appropriate for use at the site. The restrictions must also protect the integrity and physical accessibility of, and legal rights of access to, any ongoing remediation facilities at the site.]

4.01. Prohibited Uses. Future use of the Property shall be restricted to industrial use only, and the Property shall not be used for any of the following purposes: *[Note: These prohibitions must be based on the appropriate decision documents as set forth in Paragraphs 1.03 and 1.04]*

[Sample provisions:]

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.
- (e) Any other purpose involving residential occupancy on a 24-hour basis.

4.02. Soil Management *[Note: The basis for the soil restrictions must be in Paragraphs 1.03 and 1.04]*

[Sample provisions]

- (a) No activities that will disturb the soil [at or below [] feet below grade] (e.g., excavation, grading, removal, trenching, filling, earth

APPENDIX E

movement or mining) shall be allowed on the Property without a Soil Management Plan and a Health and Safety Plan approved by the CERCLA Lead Agency.

- (b) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.
- (c) The Owner shall provide the CERCLA Lead Agency written notice at least fourteen (14) days prior to any building, filling, grading, mining or excavating in the Property [more than [] feet below the soil surface] [which will remove more than [] cubic yards of soil].

4.03. Prohibited Activities. *[This paragraph will not be applicable to all sites. If not used, renumber accordingly. If there are groundwater restrictions, the basis must be in Paragraphs 1.03 and 1.04]* The following activities shall not be conducted at the Property:

[Sample provisions]

- (a) Raising of food (cattle, food crops).;
 - (b) Drilling for [drinking] water, oil, or gas [without prior written approval by the CERCLA Lead Agency].
- [or]* (b) Extraction of groundwater for purposes other than site remediation or construction dewatering.

[The following paragraphs are samples of restrictions that may be applicable when there is a cap, vapor and/or gas collection system, and/or groundwater monitoring system.]

4.04. Non-Interference with Cap [and Vapor Extraction System (VES)] and [Groundwater Capture System (GCS)]. Covenantor agrees:

[Sample provisions:]

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the

APPENDIX E

Capped Property without prior review and approval by the CERCLA Lead Agency. *[Similar restrictions may be appropriate for other ongoing remediation systems.]*

- (b) All uses and development of the Capped Property shall preserve the integrity [*(if appropriate:)* and physical accessibility] of the Cap. *[Extend to other systems as appropriate.]*
- (c) The Cap shall not be altered without written approval by the CERCLA Lead Agency.
- (d) Covenantor shall notify the CERCLA Lead Agency of each of the following:
 - (i) the type, cause, location and date of any damage to the Cap and (ii) the type and date of repair of such damage. Notification to the CERCLA Lead Agency shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Timely and accurate notification by any Owner or Occupant shall satisfy this requirement on behalf of all other Owners and Occupants. *[Extend to other systems as appropriate.]*

4.05. Access for U.S. EPA and Department. The U.S. EPA and the Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by U.S. EPA and the Department in order to protect the public health or safety, or the environment. Nothing in this instrument shall limit or otherwise affect U.S. EPA's right of entry and access, or U.S. EPA's authority to take response actions under CERCLA, the National Contingency Plan, 40 C.F.R. Part 300, and its successor provisions, or federal law.

4.06. Access for Implementing Operation and Maintenance. *[To be used at all sites with ongoing O&M activities]* The entity or person responsible for implementing the Operation and Maintenance [Agreement] *[or Manual or Plan or Activities, as appropriate, if there is no O&M Agreement]* shall have reasonable right of entry and access to the Property for the purpose of implementing the Operation and Maintenance [Agreement *or* Manual *or* Plan *or* Activities] until the CERCLA Lead

APPENDIX B

Agency determines that no further Operation and Maintenance is required.

ARTICLE V ENFORCEMENT

5.01. Enforcement. The Department or U.S. EPA shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. This Covenant shall be enforceable by the Department pursuant to Health and Safety Code, Division 20, Chapter 6.5, Article 8 (commencing with section 25180). Failure of the Covenantor, Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department or U.S. EPA to require that the Covenantor, Owner, or Occupant modify or remove any improvements ("Improvements" herein shall mean all buildings, roads, driveways, and paved parking areas); constructed or placed upon any portion of the Property in violation of the Restrictions. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA, and violation of this Covenant shall be grounds for the Department or U.S. EPA to file civil or criminal actions as provided by law or equity.

ARTICLE VI VARIANCE, TERMINATION, AND TERM

6.01. Variance. Covenantor, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with H&SC section 25233. Unless or until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no variance may be granted under this paragraph 6.01 without prior review and prior concurrence of the variance by U.S. EPA. If requested by the Department or U.S. EPA, any approved variance shall be recorded in the land records by the person or entity granted the variance.

6.02 Termination. Covenantor, or any other aggrieved person, may apply to the Department for a termination of the Restrictions or other terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with H&SC section 25234. Unless and until the State of California assumes CERCLA Lead Agency responsibility for

APPENDIX E

Site operation and maintenance, no termination may be granted under this Paragraph 6.02 without prior review and prior written concurrence of the termination by U.S. EPA.

6.03 Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, after review and prior written concurrence by U.S. EPA, this Covenant shall continue in effect in perpetuity.

ARTICLE VII MISCELLANEOUS

7.01. No Dedication or Taking. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever. Further, nothing set forth in this Covenant shall be construed to effect a taking under state or federal law.

7.02. Department References. All references to the Department include successor agencies/departments or other successor entity.

7.03. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of [name of county] within ten (10) days of the Covenantor's receipt of a fully executed original.

7.04. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner: *[include name and address of Owner and name of person to receive service]*

APPENDIX B

To Department: *[title and address of Regional Branch Chief.]*

To U.S. EPA: *[titles and addresses of RPM and ORC]*

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. Partial Invalidity. If any portion of the Restrictions or other terms set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant, or the application of such portions to persons or circumstances other than those to which it is found to be invalid, shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

7.07 Statutory References. All statutory references include successor provisions.

IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor: *[name of Covenantor]*

By: _____

Title: *[signatory's name and title]*

Date: _____

Department of Toxic Substances Control

By: _____

Title: *[signatory's name and title]*

Date: _____

"U.S. EPA" as a Third Party Beneficiary

APPENDIX B

By: _____

Title: *[signatory's name and title]*

Date: _____

APPENDIX B

STATE OF CALIFORNIA)

)

COUNTY OF _____)

On this _____ day of _____, in the year _____,

before me _____, personally appeared

_____,

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____